

SOUTH AFRICA / JUDGMENT

Luna v Smith (16800/2018) [2019] ZAWCHC 156 (11 November 2019)

[2019] ZAWCHC 156**COURT**

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

16800/2018

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****WESTERN CAPE DIVISION, CAPE TOWN****CASE****NO: 16800/2018****DATE:**

2019/11/11

In the matter between

JUNE

MARIA LUNA

Applicant

and

CRAIG

STANFORD SMITH

Respondent

JUDGMENT

BOZALEK, J: On 13 August 2019 I heard the applicant's application for admission as an attorney and granted the application

two days later.

The order admitting the applicant was followed by a judgment handed down on 29 August 2019. In it I gave notice of an intention to make a punitive costs order against the respondent, an attorney and the applicant's former principal, who refused to furnish her with the customary supporting affidavit and instead sought leave to intervene in the application. Having succeeded therein the respondent filed a notice to oppose and a lengthy opposing affidavit which culminated in him asking that the application be dismissed with costs on the attorney client

scale, including the costs of two counsel.

A copy of the judgment was served on the respondent and he was invited to make submissions on the issue of costs and in particular the mooted costs order against him. To that end I received written submissions from the respondent and a reply from the applicant.

On 7 November 2019 I heard full argument on the question from the respondent personally and from the applicant's counsel.

The respondent has urged me to make no costs order against him, let alone a punitive order. In support of his case the respondent argued that it was his duty as an officer of the court to file the opposing affidavit, that in so doing he had raised the important matter of the applicant having held the office of a company director while she served articles in contravention of the then governing statute, that he had been the subject of a vicious attack in the applicant's founding affidavit and that he had no choice but to respond in order to put his side of the story and to clear his name and finally, that the only reason that he had filed a notice to abide at a later stage was that he was no longer in a financial position to oppose the application.

The applicant's counsel's contention was that none of the respondent's arguments had any merit, that the court should make the costs order it initially envisaged and that the order should include the post judgment steps and hearing.

In order to refresh myself I have in addition reread the applicant's founding affidavit, the respondent's opposing affidavit and my judgment. In doing so I have come to the conclusion that my overall description of the respondent's opposing affidavit is, if anything, understated. It stands as an unbridled and an all-out attack on the applicant as a person and on her fitness to be admitted as an attorney of this court.

It does not end there since nearly every person who associates themselves with the applicant's case or is mentioned by her

similarly became the subject of scathing and often irrelevant criticism by the respondent.

I accepted the respondent was entitled to seek to set the record straight, as it were, given that the applicant had painted an unflattering picture of him in her founding affidavit and furthermore that the applicant could have been more restrained in her own affidavit in this regard. However, it must be borne in mind that the applicant had no real alternative but to ventilate the circumstances which gave rise to the extraordinary situation that the respondent refused to furnish an affidavit in support of her application for admission.

Two further points need to be made in this regard. On 25 June 2018 the applicant sent a polite if slightly presumptuous email to the respondent enclosing a draft of the principal's affidavit that she wished him (that is the respondent) to sign in support for her application for admission. The terms of the draft affidavit were in no way out of the ordinary. The respondent's response was unequivocal, namely, that he would not sign the affidavit since he disagreed with it "for a host of reasons".

He then made mention of various alleged improprieties on the part of the applicant, which he would in due course “substantiate

exhaustively”. He also mentioned the applicant’s permanent residence status, implying that it was irregular. On any reading of this response it was clear that the applicant could expect no support from the respondent in her application but instead active opposition. And so it proved.

In argument the respondent suggested that if the applicant had approached him after this exchange of emails he could have taken a different approach to the application and “something could have been worked out”. But this suggestion only underlines that the respondent acted improperly and immaturely. He should have pointed out what difficulties he had with the affidavit and made his willingness to discuss issues that allegedly troubled him explicit. He did not do so and it clearly appears, now that I have heard the respondent, that this arose out of a mixture of pique and spite on his part. At the very least the respondent wanted the applicant to make herself a supplicant for his support of the application.

The second point which needs to be made is that there was no need at all for the respondent to actively oppose the application or to file a 40-page affidavit with 30 pages of annexures. In so doing he came close to purporting to usurp the authority and function of this court. He could from the outset have filed a notice to abide and a short measured affidavit setting out in clear terms the factual basis for why he felt he could not support the application.

As regards the second main argument raised by the respondent, at this stage it is correct that as a result of the respondent raising the question of a directorship held by the applicant during her period of service this matter was ventilated in the papers and eventually condoned by the Court. However, this issue played a minor role in the application as a whole and its relevance is completely outweighed by the numerous irrelevant and negative, if not malicious, allegations made by the respondent in opposition to the relief sought.

Thirdly there is the matter of the respondent’s explanation for his late filing of a notice to abide. I do not accept that this was motivated only by straitened financial circumstances on the respondent’s part. He could have argued his case in person as he has done in regard to the question of costs. Much more probable was a dawning realisation on his part that he had got himself into litigation where he ran a serious risk of an adverse costs order or adverse findings.

I repeat – litigants cannot oppose an application, particularly one of this nature, and then at a late stage file a notice to abide expecting that this will immunise them against a costs order. At the very least such litigants will run the risk of an adverse costs order up until the notice to abide is filed.

There is one final matter which I must deal with and that is the respondent’s repeated references, both in the papers and in argument, to the validity or lawfulness of the applicant’s status as a permanent resident. Each of these references were accompanied by the implication that the applicant’s permanent residence status was suspect insofar as it relates to or related to her admission as an attorney. When the respondent was asked during argument why he repeatedly

brought up this issue his reply was that it was incumbent on him to do so having regard to Section 43 of the Immigration Act.

This question was posed to the respondent because he acted for the applicant in obtaining her permanent residence status and prima facie any doubts that he harboured regarding her status potentially raised serious ethical issues given the pre-existing attorney client relationship.

Section 43 of the Immigration Act 13 of 2002 provides inter alia that a foreigner shall abide by the terms and conditions attached to a permanent residence permit and that such status shall expire upon the violation of those terms and conditions.

The applicant described her permanent residence status in her founding affidavit and that it did not preclude her from working or admission as an attorney. Despite having the opportunity to do so in his opposing affidavit the respondent raised no reason why the applicant's status as a permanent resident was in jeopardy or was questionable. All he did was to speculate as to whether she had maintained the financial conditions which initially gained her the permanent residence status.

The respondent is not an agent for the Department of Home Affairs and is not burdened with an obligation to ensure that his former clients comply with the conditions of their permits to remain in this country. In these circumstances I see the repeated raising of this issue by the respondent as ethically improper and an attempt to intimidate the applicant. In my view it represents yet a further serious lapse of judgment on the part of the respondent and reveals an alarming inability on his part to appreciate his obligations as an attorney to a client.

The prolonged exercise of affording the respondent an opportunity to make representations on the question of costs has served only to strengthen my initial prima facie view that it is appropriate for the court to make a costs order against the respondent arising out of his opposition to the application.

For all these reasons, given both in this and in the main judgment, I consider that any costs order must be on a so-called punitive scale as a mark of the court's disapproval of the respondent's ill-advised and unseemly opposition to the application and in effect using the applicant's application for admission as a vehicle for settling personal or professional scores against the applicant.

Given that the bulk of the costs were incurred before the respondent filed his notice to abide and that a prolonged hearing was by that stage unavoidable I see no reason to limit such costs to any period, nor can I see any warrant to deprive the applicant of her costs in regard to the post judgment period when the issue of costs was dealt with.

In the result the following order is made. The respondent is to pay the applicant's costs occasioned by his opposition to the application on the attorney and client scale, including any costs incurred by the applicant after judgment was handed down which relate to the determination of the issue of costs.

BOZALEK, J

JUDGE OF THE HIGH COURT

DATE:

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